by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect. There must be a special authority to institute, although a general authority is sufficient to enable a solicitor to defend a suit.

As his Lordship concluded:

"In this case, the plaintiff has positively sworn that he gave no authority whatever to file the bill, and this is met by only a general assertion of his being authorized, on the part of the solicitor. The motion must therefore be granted."

In the present case, however, I am concerned with a dispute as to authority, not as between a client and his own solicitor, but as between a plaintiff and a solicitor who purports to represent a defendant. In other words, this is not a case where the defendants are asserting that Messrs. Darshan Singh & Co. had no authority to enter the conditional appearance on their behalf. It is, as I have said, the plaintiffs who are making that assertion and, when the material in support of that assertion is examined with care, it is obvious that there is no evidentiary basis for it.

I must now touch on a point made by counsel for the plaintiffs with regard to Admiralty in Rem No. 9/84. My attention was drawn to the fact that in those proceedings, Messrs. Darshan Singh & Co. were the solicitors on record for the plaintiffs who were, as I have said, the crew of the "Santa Arona" suing for wages whilst Messrs. Chang & Vello were the solicitors on record for the defendants who were the owners of the vessel. It was said that it was odd that Messrs. Darshan Singh & Co. should be acting *against* the owners in those proceedings and yet were acting *for* the owners in the present proceedings. Then it was said that in Admiralty in Rem No. 9/84, no objection was taken by Messrs. Darshan Singh & Co. to the *locus standi* of Messrs. Chang & Vello to represent the defendants.

I regret I find these submissions of no relevance to the issues which arise for decision upon the present application.

It must be recognized that Admiralty in Rem Nos. 5/84 and 9/84 are two entirely different suits which disclose different causes of action (one for wages and the other for loss of cargo) involving different plaintiffs though the defendants are the same.

I see nothing inconsistent in Messrs. Darshan Singh & Co. acting for the defendants in Admiralty in Rem No. 5/84 whilst acting against them in Admiralty in Rem No. 9/84. It certainly does not prove that Messrs. Darshan Singh & Co. had no authority to act for the defendants in Admiralty in Rem No. 5/84.

Similarly, I see nothing inconsistent in Messrs. Chang & Vello acting for the defendant owners in Admiralty in Rem No. 9/84 and Messrs. Darshan Singh & Co. acting for the defendant owners in Admiralty in Rem No. 5/84. The failure of Messrs. Darshan Singh & Co. to take objection to Messrs. Chang & Vello acting for the defendant owners in Admiralty in Rem No. 9/84 does not, in my view, prove that Messrs. Darshan Singh & Co. had no authority to act for the defendant owners in Admiralty in Rem No. 5/84.

I must, therefore, accept the assertion, on oath, of Mr. Darshan Singh that he had authority to defend the action. Accordingly, ground (b) of the plaintiffs' objection also fails.

In the result, the application is dismissed with costs.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Darshan Singh & Co.*

PUBLIC PROSECUTOR v. SAMSUL KAMAR BIN MOHD. ZAIN

[O.Cr.J. (K.C. Vohrah J.) 5 February 1988]

[Kuala Lumpur — Federal Territory Criminal Trial No. 22 of 1984]

Criminal Law — Dangerous drugs — Trafficking — Merits of defence — Dangerous Drugs Act 1952, s. 39B(1)(a).

Criminal Procedure — Application to use part of cautioned statement for purposes of section 157 of the Evidence Act — Merits of application — Evidence Act 1950, s. 157 — Criminal Procedure Code (F.M.S. Cap. 6), s. 425 — Dangerous Drugs Act 1952, s. 37A.

The accused was sitting on a bench with another person in front of a building when he was arrested by the police. Two packages were found on the accused. The packages contained heroin weighing a total of 24.22 grammes. The accused was charged with trafficking in heroin. The defence of the accused was mainly an admission that he possessed only one of the packages and

that the other package belonged to the person who was sitting beside him on the bench.

Held: on a balance of probabilities, the accused was trafficking in heroin and was therefore found guilty and convicted accordingly.

[*Editorial Note:* In the course of the trial, the defence applied to the court to use part of the cautioned statement of the accused for the purpose of section 157 of the Evidence Act. The court made a ruling allowing the application. The text of the ruling is reproduced after the main judgment.]

Cases referred to:

(1) *Public Prosecutor* v. *Mohamed Noor bin Jantan* [1979] 2 M.L.J. 289 (cited).
(2) *Wong Kam-ming* v. *The Queen* [1979] 1 All E.R. 939 (cited).
(3) *R.* v. *Thomas Michael Treacy* [1944] 2 All E.R. 229 (cited).
(4) *Loke Poh Siang* v. *Public Prosecutor* [1957] M.L.J. 107 (cited).
(5) *Public Prosecutor* v. *Boo Chew Hia* [1963] M.L.J. 33 (cited).
(6) *Public Prosecutor* v. *Abdul Hamid* [1969] 1 M.L.J. 53 (cited).
(7) *Ramli bin Kechik* v. *Public Prosecutor* [1986] 2 M.L.J. 33 (refd).
(8) *R.* v. *Bakar bin Sahat* [1951] M.L.J. 202 (cited).

HIGH COURT.

Foo Lee Mei (Deputy Public Prosecutor) for Public Prosecutor.

Terrence Marbeck for the accused.

Cur. Adv. Vult.

K.C. Vohrah J.: The accused was charged as follows:

"That you on 7 May 1984 at about 10.20 p.m. at Complex Kota Raya, Jalan Tan Cheng Lock, in the city of Kuala Lumpur, in the Federal Territory, did on your own behalf traffic in dangerous drugs to wit heroin weighing a total of 24.22 grammes and you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under section 39B(2) of the same Act."

The main prosecution witness, Inspector Yusof bin Hj. Tahir (PW1), stated that on 7 May 1984 at about 10.20 p.m. he went with Inspector Mohd. Yusof bin Mohamad (PW6) and two other police personnel, all in civilian clothes, to Complex Kota Raya, Jalan Tan Cheng Lock, Kuala Lumpur. On arrival at the place, he saw two male Malays sitting on a bench outside the complex and the police party approached them. He identified himself as a police officer and conducted a body search on both of them. He searched the accused first. He found a package wrapped in a piece of Chinese newspaper (P6) in the accused's left trouser pocket. When he unwrapped the package, he found that it held seven plastic packets (P7A to G) which he suspected contained heroin.

He continued his search on the accused and recovered from the accused's right trouser pocket a plastic bag (P8). He unwrapped it and found that it held ten plastic packets (P9A to J) which he suspected to contain heroin.

PW1 then searched the other male Malay, Azmi (PW5), who sat beside the accused on the bench but nothing incriminating was found on this person.

After this, he arrested both the accused and Azmi.

Under cross-examination, PW1 stated that an informer accompanied the police party to Complex Kota Raya and pointed out to him the accused who was sitting on the bench before PW1 made a body search on the accused.

Inspector Yusof bin Mohamad, PW6, who accompanied PW1 and the police party that night, corroborated the evidence of PW1 that the accused was sitting together with Azmi, PW5, on a bench in front of the complex. He confirmed that PW1 searched both the accused and Azmi (PW5) and that the accused was searched first. He confirmed the recovery of the bundle wrapped in a piece of newspaper containing seven plastic packets from the accused's left pocket and a plastic bundle containing ten plastic packets from the accused's right trouser pocket. He also confirmed that PW1 brought along an informer for the raid.

Azmi, PW5, also confirmed that he sat beside the accused on the bench. He said that he was having a conversation with the accused at that time. He saw PW1 search the accused first and saw him take out plastic packages from the trousers pockets of the accused. He said he could not describe both the packages as the incident took place a long time ago. He added he too was searched and that "they found nothing on me".

Inspector Moktar, PW3, the investigating officer of the case, related to the court that he received a newspaper wrapping (P6) containing the seven plastic packets (P7A to G) and a plastic bag (P8) with the ten plastic packets (P9A to J) from PW1. The 17 plastic packets contained a substance

suspected to be heroin. He then sent them to the chemist (PW4) on 10 May 1984 in two sealed envelopes marked "A" and "B" respectively. He said he received back these two envelopes sealed with the chemist seal. The two envelopes (P4 and P5) sealed with the Department of Chemistry's seals were cut open by PW1 in court when he was requested to identify the piece of newspaper and seven plastic packets wrapped in it (contained in P4) and the plastic bag containing ten plastic packets (contained in P5).

The chemist, PW4, gave a report of the analysis he made of the contents of the 17 plastic packets. His evidence was that the substance in the 17 plastic packets contained 24 22 grammes of heroin, a dangerous drug listed in List I of the First Schedule to the Dangerous Drugs Act 1952.

Before I proceed to examine whether a *prima facie* case under section 39B(2) of the Dangerous Drugs Act 1952 has been made out, it would be necessary at this stage to examine the line of cross-examination made by defence counsel.

The cross-examinations of the main prosecution witnesses were meant to show that the accused did not have possession of the drugs; that at that time he was playing with a "game watch" electronic device and the two packets were lying on the bench; that he did not have the two packages of drugs on his person – that in fact he was wearing a slim-fit pair of trousers and that the two packages of drugs could not possibly have got into the pockets of his trousers together with the other personal things like his NRIC, keys and purse he had on his person; that the pair of trousers which were produced in court was not the one he was wearing that day. Questions were directed to show that Azmi was not the innocent person he appeared to be; if nothing was found on him why was he arrested? It was alleged that Azmi had possession of the drugs and that because Azmi escaped from police custody the police had pinned the possession of the drugs on the accused. It was implied that the police took $3,000 which, it was alleged, Azmi had on him at the time of Azmi's arrest.

PW1 and PW6 denied that the drugs were found on the bench and not found on the accused's person. PW1 explained that no search list was prepared as the drugs were found on the accused's person. PW1 folded the packages he found into their original sizes and each appeared to be small enough to go into each of the trousers pockets. The investigating officer said that he did not test if the packages would go into the trousers pocket because of their size (each approximately 3½" x 4½"); each could go into one pocket. The investigating officer testified that the pair of trousers, a very light grey pair, was taken off the accused after he had brought the accused to a house in Gombak on 10 May 1984 where he had taken another pair from that house for the accused to change into. He had custody of the pair of trousers which he took from the accused from that date till he produced it in court.

The investigating officer was also questioned as to the fact that in Police Form 56, which was used to record personal items of prisoners in lockups, the colour of the pants of the accused was put down as white. The person who recorded this was not called but the fact remains that the pair of pants was a light grey pair and a mistake of the colour could well have been made by the recorder. PW6, Inspector Yusof, who was in the police party that arrested the accused was positive that the accused wore a pair of light grey pants.

As regards the allegation that he had an electronic device, a "game watch", in his hand, PW1 was adamant that accused did not hold one. Azmi who was cross-examined on this said he could not remember if the accused was with such a device. PW6 was not asked about the electronic device.

Regarding the questions on Azmi's complicity in the possession of the drugs, Azmi (PW5) denied that he was in possession of the drugs. He was not asked if the two packages of drugs were lying on the bench as was put to PW1. Instead, he was asked if one package was on the bench and which he denied. Azmi said that he himself asked to be involved in a follow-up project on 8 May 1984 after he had been detained under section 117 of the C.P.C. as he was then a drug addict and used to give information to the police. He said that he took part in the project at Setapak from 8 p.m. to 12 p.m. to arrest a towkay who supplied drugs but the project proved abortive. He denied he escaped from police custody on 8 May 1984. He said he was released on a personal bond of $500 by the Deputy O.C.C.I. of the Anti-Dadah Section on 9 May 1984. He readily admitted that he had been a small time seller of drugs and that some time after his arrest he had been sent to Pusat Insaf Diri Tampoi after a urine test.

Azmi was not asked about the $3,000 on his person on the day of his arrest. Defence had put to

Inspector Mohd. Yusof (PW6), one of the officers in the police party which arrested the accused, that $3,000 was found in Azmi in the inquiry office. PW6 denied this.

There was great play that Azmi had escaped from custody. As stated earlier, Azmi had denied this; he said after the follow-up project on 8 May 1984 he was released on personal bond. PW2, the investigating officer of the case, and Inspector Yusof (PW6) denied that the accused escaped from police custody. At first, however, PW2 agreed that Azmi escaped but it became clear at the later stage of the evidence that as he was not involved in the follow-up project he was not sure whether Azmi escaped, only that Azmi had been given "jamin" to do the follow-up operation. He said what he meant by "jamin" was that Azmi was allowed "permission" to do the follow-up project. PW6 who conducted the "project" with Azmi on 8 May 1984 said after he had interrogated Azmi he was satisfied that Azmi could help the Anti-Narcotic Division to arrest a drug trafficker and that Azmi volunteered himself for the project. He said that on the instructions of the Deputy O.C.C.I., Anti-Narcotics Section, A.C.P. Hashim bin Hassan (DW2), he released Azmi on bail on the afternoon of 8 May 1984 in order to make him feel easy and relaxed for the follow-up operation. He said a cautioned statement was recorded from Azmi in the morning of 9 May 1984 and subsequently Azmi contacted him a few times in the office.

So far as the prosecution's case is concerned, at the close of it, I was satisfied nothing in the evidence elicited during the cross-examination of the witnesses had showed that the evidence as regards the possession by the accused of the two packages containing 24.22 grammes of heroin as being inherently incredible on a *prima facie* basis. The onus was therefore on the accused to rebut the presumptions that he knew the nature of the drug and that he was trafficking in it.

The accused elected to give evidence on oath. He admitted to the possession of the package, the plastic package not the newspaper package, of heroin. He admitted that the plastic package was in his *right trouser pocket.* He said the newspaper package belonged to Azmi and that Azmi had placed it on the bench beside him (Azmi).

He said that on day at about 9.40 p.m. he was seated on a bench waiting for Azmi. At about 9.45 p.m. a Chinese towkay, whom he had promised to meet, came along and handed him two packages, one a plastic package for him and a newspaper package for Azmi which the towkay requested him to pass to Azmi who had not arrived there. The accused said he inserted the plastic package into his right trouser pocket.

After the Chinese man had left, the accused went back to the bench and waited for Azmi. Azmi came after two minutes and he passed the newspaper package to him. After that, both of them sat down on the bench and Azmi put this package by his side on the bench. The accused said he did not know what was in the newspaper package.

He and Azmi chatted for five to ten minutes and then the police came and searched him and Azmi. He said the police found the plastic package containing the drugs in his right trouser pocket and in his left trouser pocket they found a toy (a electronic device, a "game watch").

He said he knew the plastic package contained ten packets of heroin and that he had paid $250 in advance for the drugs which were meant for his own consumption as he was a drug addict.

He said that Azmi and he were brought to the police station and he and Azmi together with one Zulkifli (DW4) and one Kit were put in one lock-up. He said that that night, "Azmi called me and asked me to admit to the newspaper packet by his side to be mine. And Azmi told me he wanted to make a trap for the said towkay. And should the Chinese towkay be arrested, the police would add the drugs that were found on the Chinese man." He said he told Azmi that he did not even know the house where the Chinese man stayed and that he (the accused) was only responsible for the plastic package found, not the newspaper package.

The following day, he and Azmi were brought before a magistrate where they were both remanded for five days under section 117 of the C.P.C. Then they were taken back to Jalan Bandar Police Station where he saw several police personnel, including PW1, PW3 and PW6. PW6 drew a plan of the location where they wanted to arrest the towkay that night. He said Azmi was taken back to the lockup for a while and at about 5 p.m. to 6 p.m. he was taken out alone. During the period he was in the lockup, Azmi told him that he (Azmi) had organized a project to arrest the towkay.

The defence called three witnesses, Zulkifli (DW4), one of his cell mates on 7 May 1984, and

three police witnesses, A.C.P. Hashim (DW2), the officer in charge of the Anti-Narcotics Division, Inspector Shamsuddin bin Yacob (DW3) who applied for the detention of Azmi and the accused under section 117 of C.P.C. on 8 May 1984 and Inspector Ahmad bin Nordin (DW5), the officer who recorded a cautioned statement from the accused. PW2, Inspector Mokhtar, the investigating officer of the case was also re-called for cross-examination.

Zulkifli (DW4) in his evidence said that on 7 May 1984 he was detained in the same lockup with the accused together with one Chinese male and one Danny. The accused had already stated that Azmi was also known as Danny. DW4 said he heard Danny say to the accused, "I'll be a police informer and I will try to get the Chinese towkay arrested." He said that Danny said he planned to escape and if he managed to escape he would contact the accused's family. He said Danny said, "The things I don't know what they are, in the meantime you just admit they are yours." He said there was an argument between Danny and the accused and Danny said, "One thing belongs to me – I admit but I do not know about the other barang." He said the accused told Danny, "I will admit the thing belonging to me. Your thing you admit."

Zulkifli was asked if he had heard anything before the accused and Danny were put into the lockup and he said he heard Danny say, "If I manage to escape don't worry – I have $3,000."

He said the next night, *i.e.* the night of 8 May 1984, two persons came to the lockup and shouted repeatedly, "Su, where is Danny's house?" They were there 10 to 15 minutes and they scolded the accused. He said at that time Danny was not in the lockup.

I come now to the evaluation of the evidence.

As regards the accused's evidence that Azmi had placed the newspaper package by his side on the bench, the evidence of PW1 and PW6 was clear that the newspaper package was not found on the bench, quite contrary to the accused's story; both packages were in his pockets. In fact, much was made of the allegation that the accused was wearing a pair of slim cut trousers the pockets of which could not contain the packages. But as was pointed out, in his defence the story changed to one of his having only the plastic package in his right pocket, the other pocket having an electronic device, "a game watch", which meant, inferring from what the accused said, the other package could not have been in that pocket. It will be remembered that it was put to PW1 that the accused had the device in his hand. So much for the slim cut trousers and the electronic device.

It will be remembered that Azmi, PW5, himself denied being in possession of the drugs. In fact, Azmi stated that he saw PW1 search the accused and recover two plastic packages from the accused's trousers pockets. While there was a discrepancy in his evidence that both the packages were plastic packages when all the other evidence showed that there was one plastic package and another newspaper package, his explanation, that he could not describe both the packages because the incident took place a long time ago, was a perfectly plausible explanation.

There was an attempt to show that Azmi was not as innocent as the prosecution appeared to show him to be and that he was in possession of the newspaper package of drugs that night. That was the effect of the accused's and Zulkifli's evidence.

But Azmi's evidence was quite clear – that he had stopped to chat with the accused that night when the police ambushed the accused and him. His evidence that he and the accused were searched was borne out by the evidence of PW1 and PW6. His evidence that both the packages of drugs were recovered from the accused's trousers pockets was also borne out by PW1 and PW6. His admission that he helped the police in an operation on the night of 8 May 1984 was borne out by the evidence of PW6. A.C.P. Hashim, DW2, who was then in charge of the Anti-Narcotics Division, stated in court that he instructed PW6 that if anyone of the two who had been arrested had nothing (*i.e.* no drugs on him) Inspector Yusof should allow that person to go on bail in order to carry out further investigations and getting more information. The evidence of PW6 was that after he had interrogated Azmi (who in his evidence confessed he was a small drug dealer and an addict) he was satisfied that Azmi could assist the Anti-Narcotics Division to arrest a drug trafficker and this aspect of the evidence showed the reason why Azmi was used by the police – it nullified the allegation that although Azmi was caught with a package of drugs he escaped and therefore the police had to pin the offence of trafficking in both packages of heroin on the accused.

Before I go further, I would like to deal with the point raised by defence counsel that if Azmi

had been remanded for five days under section 117 of the Criminal Procedure Code on 8 May 1984 (and this was clear from the evidence of Inspector Shamsuddin (DW3)) why was it that Azmi was released on bail the same day? A.C.P. Hashim had stated that had he known that Azmi had been remanded he would not have ordered him to be released on bail. But the point is Azmi was released on bail. Whether his release was right or wrong in law is not in issue. What matters is that the overwhelming evidence is that he was released on bail.

In any event, Azmi denied he escaped – he said he was released on bond though he said that was on 9 May 1984. While at first Inspector Moktar, PW3, was not clear whether Azmi escaped, from the rest of PW3's evidence it became apparent that Azmi in fact had permission to go along for the project and when he was recalled by the defence he stated that it was in his diary that he was informed by A.C.P. Hashim that Azmi had been granted bail. PW6's evidence was clear that A.C.P. Hashim had directed him to release Azmi on bail and he released Azmi on bail on 8 May 1984. While the bail bond was not produced in court and although much was made of the wrong bail bond being used, the point is Azmi was released on bail whatever may have been the inadequacies in law for so doing for the purpose of the project. There was a discrepancy between Azmi's evidence and that of PW6 as to when Azmi was released but to my mind there could have been a genuine mistake on the date. According to PW6, a cautioned statement was recorded from Azmi on 9 May 1984 and Azmi contacted him a few times after release and that could have meant Azmi did not escape.

As regards the evidence of Zulkifli, I found it difficult to believe. In his examination-in-chief, he said he heard Danny (Azmi) say, "The things I don't know what they are, in the meantime you admit they are yours." Now Azmi who was heard to say he did not know what the "things" were was heard to say later, "One thing belongs to me – I admit but I do not know the other barang."

Under cross-examination, he said he could not remember what he was doing when the accused and Azmi were brought into his cell; he could not even tell whether he was sleeping. He said that at the beginning both of them were quarrelling and the accused told Azmi, "This thing I admit, the other you have to answer for that." Yet he was not sure what transpired before that. Although in the examination-in-chief he said he heard Azmi tell the accused before they were put into the lockup, "If I manage to escape don't worry – I have $3,000" yet under cross-examination he said he did not hear any conversation before they were put in the lockup. He said he heard the matter regarding "$3,000 plus" but this was inside the lockup. None of these matters were even put to Azmi when he gave evidence. He was not even asked generally about the matter of the $3,000. Zulkifli's evidence that the police came to the cell on 8 May 1984 and asked the accused for Azmi's address was not borne out by the accused's evidence. In any event, Azmi had himself stated he was a police informer and it is unlikely the police did not know his address. The attempt by Zulkifli to bolster the accused's allegation that Azmi escaped on the night of 8 May 1984 was certainly not borne out by Azmi (PW5) who denied he escaped and by PW6 who said, as stated earlier, that a cautioned statement was recorded from Azmi on 9 May 1984. To my mind, Zulkifli had come to give evidence merely to help the accused regardless of the truth of what happened at the cell the night of 7 & 8 May 1984.

I now turn to the facts in a cautioned statement made by the accused which appeared to corroborate his testimony on those facts. I allowed Inspector Ahmad, DW5, called by the defence, to give evidence on some facts appearing in a part of a cautioned statement which the defence stated was voluntarily made by the accused to corroborate, under section 157 of the Evidence Act 1950, some facts given in the accused's evidence. Defence counsel had claimed that the first part of the cautioned statement was voluntarily made by the accused but that the distinct and separate later part of the statement was not voluntarily made. I overruled the objection of the Deputy Public Prosecutor to the use of the first part. My ruling appears in Annex A to this judgment.

DW5 read the relevant parts of the statement which showed that the accused stated that a Chinese man had come and given him a package the contents of which he did not know and that the Chinese man reminded him to hand over the package to Danny (Azmi). It was also stated by the accused that Danny arrived at 10.20 p.m. and immediately the police ambushed them. It was also stated by the accused that while the search was going on they (the police) discovered a package containing drugs from the left pocket of his trousers.

Superficially, the facts appear to corroborate the same matters in his testimony, that there was a

Chinese man who handed him a package of drugs for Azmi, that Azmi arrived there and that one package containing drugs was discovered in his pocket. But whereas in his evidence he said that after Azmi arrived he and Azmi had a chat for five to ten minutes before the police ambushed them, in the cautioned statement he stated that as soon as Azmi arrived at 10.20 p.m. the police ambushed them. Then whereas he said in evidence that he kept the plastic package of drugs in his right pocket and the police only discovered that package in his right pocket, in his cautioned statement he said the police discovered a package in his left pocket. I did not think the relevant portions of the cautioned statement corroborated the material facts in his evidence. In the face of the evidence of PW1 and PW6 that the accused had a plastic package of drugs in his right pocket and a newspaper package of drugs in his left pocket and of the evidence of Azmi that he had nothing to do with the drugs, all of which I have evaluated and found to be consistent with no reasonable doubt being created in the prosecution's case, I reject that part of the cautioned statement relating to Azmi and to the one package being found in the left trouser pocket.

The accused put up a defence primarily in an attempt to escape the effect of the presumption in section 37(da)(i) of the Dangerous Drugs Act 1952 that he was trafficking in heroin. He admitted possession of the heroin in the plastic bag which came to 13.71 grammes of heroin and disclaimed knowledge of the newspaper package containing 10.51 grammes of heroin; added together the heroin came to 24.22 grammes falling within the presumptive amount for trafficking in section 37(da)(i). But his defence is hollow and flies in the face of clear and unshaken evidence that both packages of heroin were found on his person. There is nothing in his evidence, which was an attempt to shift possession of the newspaper package containing heroin on to Azmi, which has created a reasonable doubt on the prosecution's case that the two packages were discovered on him.

To my mind, too, the two packages being found on him, he, on his admission that he knew the plastic package to contain heroin, must, on a balance of probabilities, have known that the newspaper package contained heroin.

His story that he received the two packages from a Chinese towkay that night may be true though, as explained earlier, the story that one package was for Azmi was a pure invention on the part of the accused. The amount of heroin was far too large and required an outlay beyond his means to be used for his own consumption and on a balance of probabilities I find that he was trafficking the said heroin.

I find him guilty and convict him.

ANNEX "A"

Ruling whether the defence may use a part of the accused's cautioned statement for the purposes of section 157 of the Evidence Act

Counsel for the accused has raised an issue whether he can, under section 157 of the Evidence Act 1950, make use of part of a cautioned statement recorded under section 37A of the Dangerous Drugs Act 1952 for the purpose of corroborating some facts which were testified to by the accused in this court. He says the first part of the statement made by the accused was voluntarily made but that the *later and distinct second part* of the statement was not voluntarily made. He submits that he can make use of the first part of the statement for the purpose of corroborating the testimony of the accused under section 157 of the Evidence Act as it was voluntarily made.

I think counsel is right in bringing this issue of admissibility first before calling the police officer who recorded the statement from the accused to give evidence and then raising the issue, though he has certainly caught the prosecution by surprise.

That a former statement of a witness may be proved in court to corroborate his testimony as to the same facts provided the former statement relating to the same facts was made by him at or about the same time when the facts took place, or before any authority legally competent to investigate the facts is clear from section 157 of the Evidence Act.

When, however, the admissibility of a particular type of statement is qualified by the provisions of another law requiring some prerequisites of circumstances to be satisfied before it can be considered admissible, then such provisions must be examined to see what those prerequisites are and whether the statement intended to be used for the purposes of section 157 of the Evidence Act satisfies those prerequisites.

In the case of what is commonly referred to as a "cautioned statement" in drug cases, the relevant

provision relating to its admissibility is section 37A of the Dangerous Drugs Act 1952. The provision applies to a statement which is voluntary given by a person falling under proviso (a) or (b) to section 37A of the Dangerous Drugs Act 1952. Such a statement made by a person (who is charged with an offence under the same Act) to certain categories of enforcement officers "shall, notwithstanding anything to the contrary contained in any written law, be admissible at his trial as evidence." In the case of a cautioned statement, it should be preceded by a caution in terms of proviso (b) to section 37A.

Section 37A puts an additional effect on a voluntary statement – *if the person tenders himself as a witness, the statement may be used in cross-examination and for the purpose of impeaching his credit.* This additional aspect of the provision is not inconsistent with the provisions of section 155(c) read with section 145 of the Evidence Act 1950.

The question is, when would this additional aspect be invoked by the prosecution? It is unlikely to be invoked in a *voir dire.* A trial within a trial is held whenever the voluntariness of a statement is challenged by the defence (see, generally, *Public Prosecutor* v. *Mohamed Noor bin Jantan.*[1]) Even if the accused elects to give evidence in the *voir dire,* the cross-examination of the accused would be limited to questions touching on the issue of admissibility of the statement and questions may not be put as to the truth of the statement (see *Wong Kam-ming* v. *The Queen*[2]). It seems to me, in practice, questions are indeed often asked on some of the contents of the statement relating to the fact that it is recorded in the statement that the caution was administered and explained to the accused and that the accused acknowledged that the caution was administered and that he understood the caution by signing below the acknowledgment. Some other questions are usually asked as whether he had appended his signatures on various pages of the statement and at the end of the statement. These questions to my mind are allowable if they are confined merely to the issue of the admissibility of the statement.

Bearing in mind that the accused will not be cross-examined on the truth of the statement during the *voir dire,* it seems clear that the additional aspect of section 37A of the Dangerous Drugs Act relating to the use of the statement for cross-examination of the accused and for the impeachment of his credit, once the statement is ruled by the court to have been voluntarily made, would only arise when the accused gives evidence in his defence after the prosecution has closed its case.

So far as I have been able to ascertain, the issue of the voluntariness of a cautioned statement is raised and determined when the prosecution seeks to put in the cautioned statement as part of its case. What if the prosecution has not elected to make use of the statement before closing its case? May the defence rely on it? The answer is clearly in the affirmative (see *Public Prosecutor* v. *Mohamed Noor bin Jantan*[1]).

But can the defence say of such a statement which was not used in the prosecution's case, "This part was voluntarily made but that part was not?" I do not think a counsel with any self respect would raise this issue in respect of a statement where an alleged voluntary statement is intrinsically bound with another statement which he claims was not voluntarily made. But where as in this case it is alleged that the first part of the statement was made voluntarily and that the second part, a distinct part which was recorded after he had said he had nothing more to add, was not voluntarily made, in my opinion the accused may make use of the first part to corroborate his testimony in accordance with section 157 of the Evidence Act. The first part is distinct and can be severed from the latter part and in my view the accused, as a witness, should not be deprived of his right under section 157 of the Evidence Act for the purposes of using facts recorded therein to corroborate such facts in his testimony if indeed such facts were recorded therein and where he himself claims that that part of the statement was made voluntarily.

The second part not having been proved to have been voluntarily made and therefore being inadmissible cannot be put to the accused in cross-examination (see *R.* v. *Treacey*[3]). But then, can the prosecution at the stage of the defence's case request for a trial within a trial to determine the admissibility of the second part of the statement if it proposes to use the second part of the statement, in the words of section 37A of the Dangerous Drugs Act, "if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit?"

To my mind, a cautioned statement which has been proved to have been voluntarily made, after a

voir dire to determine that had been held during the prosecution's case, can be so used. That would normally be the case. But where the prosecution has been caught by surprise by the defence as in this case and if the purpose is to contradict the accused on his testimony relating to some facts which appear to be corroborated by a part of the previous statement (and which part was voluntarily made) and these facts appear, however, to be contradicted in another part of the previous statement by the accused which it is claimed was not voluntarily made, then, to my mind, the prosecution can call witnesses in rebuttal to show that the latter part of the statement was voluntarily made, and if the court determines it was voluntarily made, that part of the statement may be *used in cross-examination* and for the purpose of impeaching the credit of the accused on the narrow issue that he stated facts contrary to the facts mentioned in the first part of the statement. The prosecution cannot apply for a *voir dire* for the purpose of using the cautioned statement as substantive evidence as that course was open to the prosecution at the stage of the prosecution's case but it elected not to do so.

As has been stated in *Sarkar on Evidence*, 13th Ed., p. 1320:

"Whenever the accused in defence gives evidence of fresh matter which the prosecution could not foresee whether it be of *alibi* [*R.* v. *Froggart* 4 Cr. App. R. 115], lawful excuse, good character ..., insanity [*R.* v. *Smith* 47 L.J. 689], or merely some collateral fact impeaching an opposing witness, the prosecution is entitled to contradict, provided such evidence be not merely confirmatory of the original case, for then it should be tendered first..."

It will be up to the prosecution to determine whether to call witnesses to establish the voluntary nature of the second part of the cautioned statement. The matter of whether there are contradictions in that part of the statement *vis-a-vis* his testimony and the earlier part of the statement is something within the prosecution's knowledge and it is up to the prosecution to decide whether to call any additional witness for a trial within a trial and to make application to this court for calling such witnesses. And this brings me to section 425 of the Criminal Procedure Code.

The court has power under the terms of section 425 of the Criminal Procedure Code to summon and examine any person as a witness (see *e.g. Loke Poh Siang* v. *Public Prosecutor*,[4] *Public Prosecutor* v. *Boo Chew Hia*[5] and *Public Prosecutor* v. *Abdul Hamid*[6]). But the power must be exercised with the utmost caution and only when, as set out in the provisions of section 425, the evidence of that person appears to the court to be essential to the just decision of the case (see *Public Prosecutor* v. *Abdul Hamid*[6]). The power is not limited to witnesses whom the court examines on its own behalf but also applies to witnesses for the prosecution as well as witnesses for the defence; hence the defence as well as the prosecution may be allowed to adduce additional evidence under this section (see the judgment of Mohd. Azmi S.C.J. in the Supreme Court case of *Ramli bin Kechik* v. *Public Prosecutor*[7]).

Section 425 further allows any court, "at *any stage* of any inquiry, trial or proceeding" under the Criminal Procedure Code, to summon and examine any person as a witness if his evidence appears to it essential to the just decision of the case. There is a power to call or recall witnesses even after the close of the case for the defence but in such a case there should be hesitation to so do without strong reasons (see *R.* v. *Bakar bin Sahat*[8]).

To my mind, the utmost caution and the same hesitation should apply before witnesses are recalled or called by the prosecution at the stage of defence proceedings bearing in mind that the pivotal principle should be that the evidence required appears to be essential to the just decision of the case. Having regard to the fact that the prosecution has been surprised by the application of the defence and that the prosecution's examination of its witnesses will be limited to the narrow issue mentioned earlier, *i.e.* the rebuttal of facts alleged by the accused in his testimony and allegedly corroborated by a previous statement, to my mind, witnesses may be called by the prosecution after it has closed its case for the limited purpose of that narrow issue. But before that can be done, witnesses may be called to show that that part of the statement which the prosecution intends to use was voluntarily made.

If the prosecution wishes in this case to call witnesses to prove that the accused made the second part of the cautioned statement voluntarily and for the limited purpose mentioned, then it may apply to this court to call such witnesses.

Order accordingly.

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